Supreme Court, U.S.
FILED
MAR 17 1994
OFFICE OF THE CLERK

No. 93-1074

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CELLSWITCH L.P. *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION

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Petitioners, by their undersigned counsel and pursuant to Rule 15.6 of this Court, hereby reply to the brief in opposition ("Resp. Br.") filed in this proceeding on behalf of the Federal Communications Commission ("Respondent" or "FCC"), and to the brief in opposition ("Int. Br.") filed in this proceeding on behalf of certain private respondents ("Intervenors").

ARGUMENT

A. Respondent, relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), attempts to defend the Court of Appeals utilization of a "reasonable interpretation" standard when reviewing the FCC's expansion of the statutory restrictions on alien participation in radio licenses. Resp. Br. 6, n.2. In so contending, Respondent, like the Court

of Appeals, ignores the inherent conflict between the deference to agency interpretations seemingly mandated by *Chevron,* and this Court's consistent requirement that a court review an agency's differential treatment of a "suspect class", such as resident aliens, under a strict scrutiny standard. *Plyler v. Doe,* 457 U.S. 202 (1982); *Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976); *Mathews v. Diaz,* 426 U.S. 67 (1976).

The appropriate standard of review is not an inconsequential matter. Seldom will an agency's interpertation or expansion of a statute be overturned when it is afforded the deference called for by *Chevron.* By contrast, "only rarely" will agency actions adversely impacting a suspect class survive examination under the strict scrutiny standard. *Bernal v. Fainter,* 467 U.S. 216, 219, n.6 (1984).

Petitioners submit that, when an agency's statutory interpretation has constitutional implications relating to a suspect class, a reviewing court cannot abdicate its obligation to strictly scrutinize that interpretation. *Chevron* cannot justify blind deference to an agency's expertise when the agency's statutory interpretation may be constitutionally defective.

Petitioners respectfully suggest that this Court afford itself the opportunity of this case to explore and resolve the conflict between the two inconsistent standards of review presented herein, which conflict, absent resolution by this Court, will continue to arise whenever an agency interprets or expands a statutory provision in a manner adverse or detrimental to the interests of the members of a suspect class.

B. Respondent attempts to preclude any consideration by this Court of the effect of the FCC's RSA specific modification to 47 C.F.R. § 22.918(b), the regulatory provision governing the amendment of cellular applications. Resp. Br. 8, n.4. Respondent contends that Petitioners failed to raise the RSA specific provision of 47

C.F.R. § 22.918(b) either before the FCC or prior to the Court of Appeals' initial decision.

Any fair review of the record in this proceeding clearly establishes that Petitioners have relied upon the RSA specific provision of 47 C.F.R. § 22.918(b) from the earliest stages. Petitioners, citing 47 C.F.R. § 22.918(b), timely submitted amendments to their subject applications. The FCC, in affirming its staff's dismissal of the subject applications, attempted to ignore the RSA specific provision of 47 C.F.R. § 22.918(b). Pet. App. 22a-23a. Petitioners, in their initial brief to the Court of Appeals, reiterated their reliance upon the RSA specific provision of 47 C.F.R. § 22.918(b). When Respondent and Intervenors, in their respective briefs to the Court of Appeals, attempted to hold Petitioners to the MSA standards of 47 C.F.R. § 22.918(b), Petitioners utilized their reply brief to discuss the RSA specific amendment to that regulation.

In any event, the Court of Appeals clearly considered the issue of RSA applicants' "opportunity to file amendments," even though it wrongly applied the MSA standard rather than the RSA standard. Pet. App. 4a. The Court of Appeals having cited "opportunity to file amendments" as a significant factor in its decision, Pet. App. 4a, Respondent cannot now claim that this issue is not properly before this Court.

C. Respondent contends that its RSA specific modification of 47 C.F.R. § 22.918(b) did not provide an "opportunity" for the curative amendment of RSA applications. Resp. Br. 8-9. In support of this contention, Petitioner tells the Court that the FCC "did not *purport* to change its absolute prohibition on the use of amendments to cure disqualifying defects in applications as originally filed," Resp. Br. 4, n.1 (emphasis added); "did not *purport* to alter the rule that an applicant that is unqualified at the time its application is submitted may not cure the defect through a subsequent amendment," Resp.

Br. 9 (emphasis added); and "did not *suggest* that [its] minor change in Rule 22.918(b) would signal any retreat from the prohibition against the use of amendments to cure disqualifying defects," Resp. Br. 9 (emphasis added).

In rebuttal, Petitioners are constrained to point out that nothing in the RSA specific provision of 47 C.F.R. § 22.918(b), or in the language of the order adopting that provision, *purported* or *suggested* any prohibition or limitation on the use of the clear and specific RSA post-lottery amendment opportunity to cure defects in RSA applications. Having failed to provide any such prior notice of intended restrictions on the use of the RSA specific amendment opportunity, Respondent now cannot claim that RSA applicants were barred from using that amendment opportunity to cure application defects.[1]

Respondent's arguments reveal that the FCC's RSA specific modification of 47 C.F.R. § 22.918(b) had an effect unintended, and in fact probably unanticipated, by the agency; the provision of an opportunity to amend an RSA application after its selection by lottery, but prior to its being subjected to extensive staff screening. The issue, however, is not what the FCC intended by its modification of 47 C.F.R. § 22.918(b), but rather the actual effect of that modification.

The Court of Appeals erred in affirming the FCC's rejection of Petitioners' curative amendments without giving due consideration to the RSA specific amendment

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[1] Prior to the RSA application proceedings, a cellular applicant was unable to cure qualifying defects in its application as originally filed only because 47 C.F.R. § 22.918(b) did not provide MSA applicants with an "opportunity" for amendment prior to their applications being subjected to extensive screening by the FCC's staff. *Amendment of the Commission's Rules to Allow the Selection From Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 59 Rad. Reg.2d (P&F) 407, 410, n.17 (1985).

provision of 47 C.F.R. § 22.918(b).[2] In doing so, the Court of Appeals could not properly consider what result the FCC *intended* by its RSA specific modification of 47 C.F.R. § 22.918(b).[3] Instead, the Court of Appeals should have considered the actual effect of the RSA specific amendment provision of 47 C.F.R. § 22.918(b). It now is incumbent upon this Court to vindicate Petitioners' due process right to have been provided with clear prior notice of the standards and procedures against which the FCC would evaluate Petitioners' applications.

D. Intervenors imply that amendments filed pursuant to 47 C.F.R. § 1.65 may not be used "to bring an applicant into statutory compliance." Int. Br. 8.[4] In support of that position, Intervenors claim that "the Commission routinely rejects attempts to cure disqualifying defects by a Section 1.65 amendment." Int. Br. 8.[5] Examination of Intervenors' authorities, however, reveals a fatal misapprehension undermining Intervenors' assertions.

Upon examination of *PrimeMedia*, it becomes clear that the FCC's rejection of that applicant's amendments was not occasioned by their character as 47 C.F.R. § 1.65 amendments, but because the applicant attempted to file

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[2] As noted above, the Court of Appeals specifically relied upon its determination that Petitioners had "no opportunity to file" curative amendments. Pet. App. 4a.

[3] "It is well settled that regulations cannot be construed to mean what an agency intended but did not adequately express." *McElroy Electronics Corporation v. FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993) (citations omitted).

[4] 47 C.F.R. § 22.918(b) allows an RSA applicant to file 47 C.F.R. § 1.65 amendments within thirty (30) days after the announcement of the selection of its application by lottery.

[5] Citing *PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd. 4293 (1988) (*"PrimeMedia"*); *Queen City Cellular Communications*, 64 Rad. Reg.2d (P&F) 582 (Comm. Carrier Bur. 1987), *aff'd*, 67 Rad. Reg.2d (P&F) 527 (1990) (*"Queen City"*); *Nevada Broadcasting Group*, No. BPCT-850725KQ, 1986 FCC Lexis 3215 (Mass Media Bur. June 19, 1986) (*"Nevada Broadcasting"*).

curative amendments after the expiration of the limited time period specified for the filing of such amendments. What the FCC held therein was that an amendment's 47 C.F.R. § 1.65 character could not be used to expand an amendment filing window. There was no implication in the *PrimeMedia* ruling that a 47 C.F.R. § 1.65 amendment could not also be a "curative" amendment. In *Queen City*, the FCC refused to allow a 47 C.F.R. § 1.65 amendment to be used to provide belatedly a required original component of an MSA application. It was not the amendment's 47 C.F.R. § 1.65 character which precluded its acceptance by the FCC. Instead, the amendment was rejected as an attempt to provide a required component out of time. *Queen City*, like *Prime Media*, contained no implication that a 47 C.F.R. § 1.65 amendment could not also be a "curative" amendment. In *Nevada Broadcasting*, the FCC refused to consider curative amendments to applications involving alien ownership. That case makes clear, however, that the rejection of those amendments was occasioned by their tender after the closing of the specified windows of opportunity for amendments in those proceedings. As in *PrimeMedia* and *Queen City*, there is no implication in *Nevada Broadcasting* that a 47 C.F.R. § 1.65 amendment could not be used to effectuate a cure of a disqualifying defect.[6]

In contrast with the *PrimeMedia*, *Queen City* and *Nevada Broadcasting* amendments' lack of timeliness, Petitioners' amendments were timely filed within the period specified by 47 C.F.R. § 22.918(b) for post-lottery amendments of RSA applications. As timely, un-

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[6] Contrary to Intervenors assertion, Int. Br. 9, *Nevada Broadcasting* clearly states and stands for the proposition that "aliens are not prohibited by Section 310(b) from applying for licenses, only from 'holding' them." 1986 Lexis 3215 at *4. That the *Nevada Broadcasting* applications were ultimately dismissed for failure to cure citizenship defects by timely amendment does not diminish the fact that unqualified aliens were able to participate in the filing of an application.

restricted amendments, they should have been given full effect and consideration by both the FCC and the Court of Appeals.

Intervenors citation of *Public Mobile Radio Services Rules*, 95 F.C.C.2d 769, 788-89 (1983), Int. Br. 8, is simply a red herring. That case stands for nothing more than the proposition that where an FCC regulation places a specific restriction on the use of a 47 C.F.R. § 1.65 amendment, such an amendment has no effect other than to update or correct application information. As pointed out above, however, nothing in 47 C.F.R. § 22.918(b), or in the language adopting the RSA provision of that regulation, gave any notice that the FCC intended to restrict the use or effect of a 47 C.F.R. § 1.65 amendment timely filed pursuant thereto.

E. Respondent and Intervenors both assert that this case does not warrant review by this Court. Resp. Br. 6 and Int. Br. 6. It is clear, however, that this case presents a conflict between two fundamental legal principles. On one hand is the deference mandate of *Chevron*, while on the other is the requirement that differential treatment of suspect classes be subjected to strict scrutiny by reviewing courts. Standing alone, this conflict, which can be resolved only by this Court, provides a compelling basis for review.

CONCLUSION

In consideration of the foregoing, and in consideration of the arguments set forth in the initiating Petition, a writ of certiorari should issue.

Respectfully submitted,

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